IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case No.: 1697/2023

Date of hearing: 10 August 2023
Judgment delivered on: 26 September 2023

In the matter between:

TRACEY LUCIETTO N.O. **APPLICANT**

And

ANDREW WELLMAN **FIRST RESPONDENT**
BATE CHUBB & DICKSON INC **SECOND RESPONDENT**
ANDRE VAN WYK **THIRD RESPONDENT**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

22/09/2023

…… ……..
Signature **Date**

JUDGMENT

MTSHABE AJ:

INTRODUCTION

[1] The Applicant in her capacity as the Executrix in the Estate of her late husband, Franco Renato Lucietto, brought an urgent application on 30th May 2023 against the Respondents seeking in the main an amount R350 000-00 (three hundred and fifty thousand rands) be paid to her from the proceeds of the sale of member's interest of Luccietto Wellman CC. This three hundred and fifty thousand rands was to be paid into the estate account.

[2] In ***Webster v Mitchell***[1], the court vocalized the test for the granting of interim relief as follows: "*In an application for a temporally interdict, applicant's right need not be shown by a balance of probabilities. It is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take facts as set out by the applicant, together with any facts set out by the Respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of applicant, he could not succeed. In considering the harm involved in the grant or refusal of a temporal interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted. Subject, if possible, to conditions which will protect the respondent".*

[3] In *Webster v Mitchell supra*, reference was made with approval to the case Setlogelo v Setlogelo[2],where **Innes JA**, dealing with the requirements to demonstrate interim harm, state the following: "*The element is only introduced by in cases where the right asserted by the applicant, though prime facia established, is open to some doubt. In such a case the test must be applied where the continuance of the thing against which an interdict is sought would*

[1] 1948 (1) SA 1186 (WLD)
[2] 1914 AD 221 @ 227

cause irreparable injury to the applicant. If so, the better Courts is to grant the relief if the dis continuances of the act complained of would not involve irreparable injury to the other party ".

[4] In *National Treasurer and others v Opposition to Urban Tolling Alliance and others*[3], it was found that Setlogelo requirements *supra* in respect of an interdict still found application within a constitutional democracy, wherein the following stated by the court:

"*Under the Setlogelo test, prima facie right that the claimant must establish is not nearly the right to approach a Court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and to decisions already made. Quite apart from the right to review and to set aside in impugned decisions, the applicants should have demonstrated prima facie right that is threatened by impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."*

[5] Furthermore the applicant for an interdict must established that there is no other alternative remedy available. The alternative remedy postulated in this contest must-

(a) be adequate in the circumstances;

(b) be ordinary and reasonable;

(c) be a legal remedy;

(d) grant similar protection[4].

[6] In the case of *Erasmus v Afrikander Proprietary Mines Ltd*[5], it was held that it was not necessary for the applicant to establish on a balance of probabilities that the injury will occur; he must simple establish on a balance of probabilities that are grounds for a reasonable apprehension that his rights will detrimentally affected.

---

[3] 2012 (6) SA 223 (CC) at PARA 50

[4] Minister of Law and Order v Committee of the Church Summit 1994 (3) 89 (B) at 99

[5] 1976 (1) SA 950 (W) at 965, Minister of Law and Oder, Bophuthatswana v Committee of Church Summit of Bophuthatswana 1994 (3) SA 89 (B) at 99 A-B

[7] Finally the requirements for the granting of interim interdict which the applicant must satisfy are the following-

(a) *prima facie* right.

(b) the well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted.

(c) a balance of convenience in favour of the granting of the interim relief;

(d) the absence of any other satisfactory remedy[6]

[8] It is against the above legal backdrop, that the applicant approached this Honourable Court and on 30th May 2023 the Court granted the following order-

1. A Rule Nisi be and is hereby issued calling upon Respondents to show cause on 20th June 2023 at 09H30, soon thereafter as counsel maybe heard, why the following order should not be made.

1.1 Interdicting and restraining the Second Respondent from disbursing the funds that it holds on behalf of or on the instructions of the First Respondent following the sale of the Lucietto Wellman CC, registration number 2003/009298/23, in order to found jurisdiction against First Respondent.

1.2 *The First Respondent be directed to instruct the Second Respondent to disburse to the Applicant, the amount of R350 000-00, in the settlement of the amount due to the Applicant following proceeds of the sale of members' interest of the Lucietto Wellman CC; in the alternative.*

1.3 *The Respondents, jointly and severally, be directed to debate the amount due to the Applicant with her, disclosing all documentation that maybe relevant, in order to determine such amounts as maybe be due to her.*

1.4 *The Second Respondent retain an additional amount of one R100 000.00 (one hundred thousand rands) in its trust account pending the finalization of this matter to ensure any costs orders that maybe in favour of the Applicant.*

[6] Ferriera v Levin NO and other 1995 (3) SA 813 (W) 830 D at 834 (C)

2. *The relief sought in paragraph 1.1 operate with immediate effect, pending the final outcome of this application.*

3. *The Second and Third Respondents be and are hereby directed to pay costs of this application jointly and severally with First Respondent in the event of them opposing the relief sought.*

4. *This application today be and are hereby reserved."*

PARTIES

[9] The proper introduction of the parties in this matter would, in my view facilitate an easy flow of reading.

[10] The Applicant is an Executrix in the Estate of her late husband, Franco Renatto Lucietto, who passed away on 6 June 2019 at Hogsback.

[11] The First Respondent of Andrew Wellman, who currently resides in the city of Perth in Western Australia who in the present proceedings has been represented by the Second Respondent and has, in respect of the financial affairs of the Close Corporation, been assisted by the Third Respondent.

[12] The Second Respondent is a legal firm of Attorneys, namely Bate Chubb and Dickson Inc., Suite 3 Norvia House, 34 Western Avenue, Vincent, East London and in these proceedings has been represented by its Director, namely, Ashely Kretzmann. The Second Respondent is joined in these proceedings by the reason of the fact that it holds the funds which are the subject of the consideration in these proceedings.

[13] The Third Respondent is Andre Van Wyk, a Chartered Accountant who conducts practice under the name, Van Wyk Chartered Accountants at 30 Drake Road, Nahoon, East London.

URGENCY

[14] First Respondent has raised a number of points in *limine.* One of them is the issue of urgency. It is a Respondent's case that the matter is not urgent despite the fact that the interim relief was granted on 30th May 2023. The First Respondent still in August 2023 argues that the matter was and still is not urgent.

[15] The court order that was granted on 30th May 2023, which I have referred to above, was granted in the absence of the First Respondent. It is my view that when an order is granted in the absence of a party and that court order comes to the attention of the party, the first available remedy, in my view is to bring an application in terms rule 6 (12) (c) which reads as follows; "*a party against whom an order was granted in its absence in an urgent application may by notice set down the matter for reconsideration of the order".* This rule envisages the determination of the matter.

[16] The First Respondent during the hearing of this matter could not explain why it did not exhaust the remedy available in Rule 6(12)(c) of the Uniform Rules of Court. Furthermore, I am of the view that the Honourable Court could not have granted an order 30th May 2023 if it was not urgent, and the applicant has not meant the requirements of for the granting of interim relief.

[17] I must mention that the legal principles governing urgency are set out in Rule 6(12) of the Uniform Rules of Court (the rules). The courts have over the years provided guidelines to the application of this rule. Rule 6(12)(a) confers a discretional power on the court seized with an application of this nature to dispense with the forms and service envisaged in rules and to dispense on the application of such time and place and manner and to prescribe procedure as it deems appropriate.

[18] The primary enquiry is aimed at the determination of whether there must be a departure at all from the usual process.[7]

[19] In *Hultzer v Standard Bank of South Africa (Pty) Ltd*[8] the court stated the following-

‘’*The court will, however, only grant such relief where an Applicant is able to persuade the court that extreme cogent grounds of urgency exist”.*

[20] Rule 6(12)(a) provides as follows:

“In *urgent applications the Court or a Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and such manner in accordance which such procedure (which shall as far as practicable be in terms of these rules as it deems fit”.*

[21] Further, Rule 6(12)(b) renders it peremptory for the applicant to “*set forth explicitly the circumstances which averred render the matter urgent and reasons why the applicant claims that substantial redress could not be afforded at a hearing in due course.”*

[22] In East Rock *Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others[9], the court stated the following the import thereof is that the procedure as set out in Rule 6 (12) is not there for the mere taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that cannot be afforded substantial redress in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is under pinned by the issue of the absence of substantial redress in the application in due course. The rules allow the court to come assistance of a litigant because of the latter where to wait for the normal course as laid down by the rules, it will not obtain substantial redress. The correct and crucial test is whether, if the matter were to follow its normal course as laid down by the Rules, an applicant will be afforded substantial*

[7] Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another 1977 (4) SA 135 (W) at 136 H-137 F
[8] 1999 2 ILJ 106 (LC) 109
[9] 2011 ZAGPHC 196 at par 6

redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as urgent application."

[23] In the case of *Mogalakwena Local Municipality v The Provincial Executive Council, Limpompo*[10] the court confirmed that it seems to me that when urgency is an issue the primary investigation should be determine whether the Applicant will be afforded substantial redress and a hearing in due course. If the Applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but not limited to) whether the Respondents can adequately present their case in time available between the notice of application to them and actual hearing, other prejudice to the Respondents and the administration of justice the strength of the case made by the Applicant and any delay by the applicant in asserting its rights. This factor is only called usually by counsel acting for the Respondents self-created urgency."

[24] In *Thulare v Sekhukhune*, the court, dealing with issue of urgency and delay in bringing the application noted the following- "There *is no merit in the issue of the urgency raised by the Respondent. The delay on its own is not a good ground to prevent the granting of urgent relief. The court still bears the obligation to decide whether after taking into account all circumstances of the matter, urgent relief is warranted. The test is whether the circumstances of the case are such that the Applicant ill or will not be afforded substantial redress at a hearing due course*[11]*.*

[25] I am of the view that the Honourable Court could not have granted an order on 30th May 2023 if it was no satisfied that the matter is urgent. In the circumstances, having considered authorities and the Applicant's position, I dismiss the point in *limine* of urgency. I find that the matter is urgent and falls to dealt with as an urgent application.

[10] 2014 (JOL32103) (GP) @ PARA 63-64
[11] 3494/2020 (2020) ZALMPPHC 44 3 July 2020) a para 15

NON-COMPLIANCE RULES OF COURT DEALING WITH SERVICE

[26] One of the directors of the Second Respondent (Bate Chubb and Dickson Inc) is Mr Ashely Kretzmann. On 26 May 2023 Mr Kretzmann wrote an email to the attorneys of the Applicant advising that the Second respondent has been authorized to accept service on behalf of the First respondent[12]. The application papers were also served upon the respondent via email. The First Respondent received the papers, and he appointed an attorney who communicated to the Applicants Attorney that the applicant does not oppose the interim relief sought by the applicant on condition that the costs of that application were reserved[13].

[27] Rule 5 of the Uniform Rules of Court, Edictal Citation, is ordered when service must be effected upon a respondent who is outside the Republic of South Africa. The First Respondent expressly authorized the Second Respondent who accept service on his behalf.

[28] It is my view that the purpose of Rule 5 is to effect service of process or application outside South Africa. In this case it appears to me that the process was not served outside South Africa. They were served in South Africa on an authorized representative of the First Respondent.

[29] The purpose of services in any proceedings is to bring them to the attention of the Respondent and object of the Rule has been fulfilled in this matter as the service was effected upon the First Respondent's authorized representative, Mr Kretzmann.

[30] In the case of *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH*[14], the court stated the following- "*It seems to me, however, that, once a defendant has entered appearance to defend as it has done in the present matter, non-compliance with the rules as to service and with Section 27 becomes irrelevant. The purpose of service in terms of the*

[12] Replying affidavit, Annexure TL 17 page 130 of the record
[13] Replying affidavit, annexure TL9 page 134 of the record
[14] 1991 (1) SA 822 (T) at 824

Rules is to bring the edictal citation to the attention of the Defendant and the purpose of s27 is to ensure that such Defendant has sufficient time to defend if it so wishes. Both of these objectives have been achieved by the particular statutory provision and rules have been exhausted ".

[31] In this matter the First Respondent has appointed attorneys in South Africa to represent him. The First Respondent is in possession of the court papers, and I am at view that it was not necessary the Applicant to proceed way of edictal citation when the First Respondent authorized his attorneys to accept service on his behalf.

[32] Furthermore it is not the First Respondent's case that the papers were never served upon him. Then it becomes common course that he was aware of the papers. Even if I am wrong in concluding that the point in *limine of* service should be dismissed, should be, the fact that the First Respondent filed an affidavit in June 2023 is the clear indication to me that he has the papers and had the opportunity to answer the allegations in the founding affidavit.

[33] Accordingly the point in *limine* of service dismissed.

DISPUTE OF FACT

[34] Rule 6(5)(g) of the Uniform Rules of Court provides that the court may direct that oral evidence be heard on specified issues with a view of resolving any dispute of fact and to that end, the court may order any deponent to appear personally, and such persons be examined and cross-examined as witnesses.

[35] In this matter the first Respondent submits that there is a dispute of fact which cannot be resolved on papers.

[36] I am of the view that there is no dispute of fact in this matter which needs to be referred to oral evidence. The Applicant's claim in this matter is founded upon her express condition of sale, that she would agree to the sale of the

business if the estate was paid an amount of three hundred and fifty thousand rand. Her alternatively claim as appearing in the Notice of Motion is that the claim is for debatment of the account.

[37] It is well known from the *Plascon-Evans v Riebeeck*[15] that the rule Plascon-Evans states that in motion proceedings, a final order maybe granted if the facts stated by the Respondent, together with admitted facts in the Applicant's affidavits, justify the order.

[38] The Plascon-Evans rule was initially formulated in *Stellenbosch Farmer's Winery v Stellenval Winery (Pty) Ltd*[16] where the court stated the following: "*Where there is dispute as to the facts, a final interdict should be granted in motion proceedings only if the facts as stated by the Respondents together with the admitted facts in the Applicant's affidavit justify such an order, or where it is clear that the facts, although not formally admitted, cannot be determined and must be regarded as admitted."*

[39] In *Plascon-Evans supra* the Appellant Division held that the general rule is that in proceedings where disputes of fact have arisen on affidavits, a final order, whether an interdict or some other form of relief, maybe granted if the facts averred in the Applicant's affidavits, which have been admitted by the Respondent together with facts alleged by the Respondent, justify such an order.

[40] In *Wightman t/a JW Constructions v Head Four (Pty) Ltd and Another*[17] the court held as follows: -

''*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact*

[15] 1984 (3) SA 623 (A)
[16] 1957 (4) SA 234 (C)
[17] 2008 (3) SA 371 SCA)

averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or counter vailing evidence). If they be not true or accurate but, instead of doing so, rests his case on a bear of ambiguous denial the court will generally have difficulty in finding that test is satisfied. See generally because factual averments stand apart from a border matrix of circumstances all of which needs to be born in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegation made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they are maybe and will only in exceptional circumstances be permitted to this disavow. There is thus a serious duty imposing upon a legal adviser who settles an answering affidavit to ascertain engage with facts which his client disputes and reflect such disputes fully and accurate in the answering affidavit. If that does not happen it should come as no supplies that the court takes a robust view of the matter."

[41] In this matter, the First Respondent alleges that there is dispute of fact on the other hand the Applicant submits that the First Respondent has not raised a real, genuine, or bona fide dispute of fact.

[42] The Applicant in this matter relies on a sale agreement. The Applicant states that it is his intention to sell the deceased's estate share to the close cooperation if she was paid an amount of R350 000.00 (three hundred and fifty thousand rands).[18]

[43] The First Respondent confirms the sale agreement. He goes further to instruct his attorney to give the Applicant an irrevocable undertaking to pay the amount to the Applicant for the proceeds of the sale.

[18] founding affidavit, pages 8 of annexure TL5-TL6 attached to the founding affidavit.

[44] I am of the view that effectively there is no dispute of fact in respect of the commitment to pay the amount of R350 000.00 (three hundred and fifty thousand rands) to the estate from the first proceeds of the sale of the member's interest in the Retail Pharmacy.

[45] Furthermore the sale agreement, paragraph 16 thereof states that the purchaser will settle all the creditors and loans up to the date of take over on the dues dates and will be subtracted from purchase price.

[46] It is my view that the First Respondent has not raised the real, genuine or *bona fide* dispute of fact as that does not appear in his answering affidavit.

[47] In the circumstances, I accordingly find that the point limine of a dispute of fact should also fail.

FACTS

[48] The agreement of sale of the member's interests in this matter was signed on 1 April 2022. The offer was accepted by the third Respondent and the Applicant. The communication between the Applicant and Third Respondent expressly communicates the Applicant's intention to accept the purchase price if the deceased's estate would receive R350 000-00.

[49] Second Respondent, was represented by Ashley Krezmann (a director) wrote a letter on 29th March 2022, wherein it is categorically stated that the applicant will be paid an amount of R350 000-00 on the sale.

[50] This issue of R350 000-00 did not be disputed by the First Respondent. I am of the view that the Respondents clearly agree that the Applicant will be entitled to an amount R350 000-00 from the proceeds of the sale.

[51] Furthermore it was agreed on 1 April 2022 that the purchaser would be responsible for all the debts by including South African Revenue Services, creditors which were owned by the pharmacy to that date of the take over and

will settle the debts on due date. It was further Provided that the purchaser will settle all the creditors and loans up to date of take over on due dates.

[52] In the founding affidavit the Applicant states the following:-

"*The agreement that I was presented with contemplated an offer of R2 000 000.00 (two million rands) for the entire member's interest in the close cooperation and in my capacity as executrix, I accepted the amount R350 000-00 on condition that it was paid as soon as the proceeds of the sale became available. Accordingly, an amount of R1 000 000.00 (one million rands) was paid to the trust account of the Second Respondent and I have since been advised that an amount well in excess of that amount in dispute hereof R350 000-00 approximately R640 000—00 remains, with the difference with the R1000 000.00 (one million rands) and current balance having been disbursed by the Second respondent on the instruction of the First Respondent."*

[53] The Applicant further states that notwithstanding request for information and request for payment of the agreed amount of R350 000-00 to the state, she has not been able to secure payment or any form of accounting with regards to the proceeds of the sale of the members interest in the close cooperation. The averment referred above by the Applicant in the founding affidavit are not expressly denied by the First Respondent in the answering affidavit. Furthermore, it is not disputed by the Respondents that an amount of R1 000 000.00 (one million rands) is paid or is in the trust account of the Second Respondent.

FINAL INTERDICT

[54] The requirements for the granting of the final relief or final interdict are the following:-

54.1 A clear right;

54.2 An injury actually committed or reasonably apprehended and

54.3 No alternative remedy. See [19]

[55] The Applicant's resistance of right is based on a being a party to the sale agreement of the close cooperation, in which the diseased has a 30% members' interest. It is clear that she has a right to be protected as the First Respondent has failed and or refused to pay her funds from the proceeds of the sale of the close cooperation. Furthermore, these funds are available in the Second Respondent's trust account, and they must be paid to the Applicant.

[56] It is common cause that the First Respondent has refused to pay the Applicant any amount due to her in terms of the proceeds of sale and alleges that no funds are due to the Applicant. This cannot be correct. It was agreed that the Applicant would be an entitled to R350 000-00 and the First Respondent did not dispute that.

[57] Furthermore, I am of the view that the Applicant has no other remedy available to her other than to approach the Honourable Court for the payment of R350 000-00 as the First Respondent has refused to inform or instruct the Second Respondent to pay such money to the Applicant.

CONCLUSSION

[58] Having consider legal principles the facts of this matter, I am of the view that the Applicant is discharged onus resting on her to be entitled to the relief she seeks.

[59] Accordingly it is ordered that the *rule nisi* granted by the Honourable Court on 30th May 2023 is confirmed, save paragraph 1.3 of the *rule nisi* which is an

[19] Setlogelo v Setlogelo 1914 AD 221

alternative relief is not confirmed. ***Accordingly, I confirm paragraphs 1.1, 1.2 and 1.4 of the rule nisi.***

[60] I must mention that the issue of costs appears to have been decided already as paragraph 3 of the order granted on 30th May 2023 deals with the issue of costs as there is no application by the Respondent vary paragraph 3 of the order granted on 30th May 2023. Paragraph 3 of the order granted on 30th May 2023, is a stand-alone paragraph, and part of *rule nisi.*

_____

MTSHABE AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant	:	Adv Sephton
		Netteltons Attorneys
		High Street
		MAKHANDA
Counsel for the First Respondent	:	Adv. Miller
	:	Cloete Attorneys
	:	High Street
		MAKHANDA